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Supreme Court of the United States

October Term, 1963

No. 821

Criminal.

MARVIN L. KLINE,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITIONER'S REPLY BRIEF ON CERTIORARI

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Introductory

Petitioner urges that the only question to be considered in this case is whether or not a federal question is presented for decision. The question which we presented is the one stated in the petition, to wit:

> "(1) Whether the submission to the jury of an issue as to which there is no evidence to support an affirmative finding together with other issues, where a general verdict is taken so that it cannot be determined upon what issue or issues the defendant was convicted, denies to the defendant due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States."

The question of whether or not the evidence sustains an affirmative finding on the other issues submitted to the jury is entirely immaterial.

I

The Supreme Court of Minnesota Denied to Petitioner Due Process of Law in Violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States by Sustaining the Judgment Convicting the Defendant Based Upon a Verdict Which in Turn was Based Upon a Permissible Finding That Petitioner Obtained Onan's Signature to the Letter, State's Exhibit H, By Trickery, Fraud or Deceit, There Being No Evidence To Support Such a Finding.

Petitioner has pointed out at pages 6–9 that the *only* evidence in the record with respect to deceit, fraud or trickery was that there was no deceit, fraud or trickery. The pertinent evidence has been cited and quoted at the pages mentioned. There was no other evidence relating to this question. The issue as to whether there was any evidentiary support for the claim of trickery, fraud or deceit, was submitted to the Supreme Court of Minnesota by petitioner's assignments of error in that court Nos. 8, 9 and 10, and the arguments in support of such assignments in Sections II, IV and V of Petitioner's Brief where the assignments of error and the captions of the subdivisions of the brief are set forth at pages 13–14 of his brief. As petitioner has pointed out, the Supreme Court of Minnesota considered these assignments of error and the arguments in support thereof by an affirmative holding that there was implicit in the jury's holding a finding that if Onan's authority in fact existed, or defendant believed it did, he secured Onan's signature by fraud and deceit

Respondent in its brief in opposition to certiorari here at page 17 thereof concedes and admits that the Supreme Court of Minnesota considered the question and decided it adversely to respondent precisely as petitioner claims it did.

Petitioner pointed out at page 16 of his brief in support of the petition for certiorari that the Federal question, which we raised had been timely raised in the Supreme Court of Minnesota and was there decided adversely to petitioner's claim. The assignments by petitioner of the denial to him of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and the necessary consideration and decision of that question by the Supreme Court of Minnesota, raised the question timely.

Yazoo & M.V.R. Co. v. City of Clarksdale, 42 S. Ct. 27, 66 L. Ed. 104

Virginia-Carolina Chemical Co. v. Kirven, 215 U.S. 252, 30 S. Ct. 78, 54 L. Ed. 179

Great N. Ry. Co. v. Sunburst Oil & Refining Co. 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360

Grant's v. Ordeau, 234 U.S. 385 34 S. Ct. 779, 58 L. Ed. 1363

Sully v. Am. Nat'l. Bank, 178 U.S. 289, 20 S. Ct. 935, 44 L. Ed. 1072

Kirkwood S. Ct. of the United States, Practice, Chapter 12, Sec. 83. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (By Richard Wolfson & Philip Kurland)

Respondent has not shown that there is one word of evidence to support an affirmative finding to the effect that the petitioner practiced any trickery, fraud or deceit on Oman in procuring Oman's signature to the letter marked

State's Exhibit H. Onan's testimony was to the effect that he did not remember signing the letter. This admission was made in spite of the fact that Onan had employed a handwriting expert to testify that the signature was not genuine and the handwriting expert refused to so testify. The state's handwriting expert, Milton Flohr, testified that "very probably" and as his "educated guess", the signature on Exhibit H was the genuine signature of Onan (R. 729, f. 3 - 730, f. 3). Furthermore, Onan himself had testified by deposition in a civil case that the signature was "my signature" (R. 338, f. 2).

The fact, as claimed by respondent at p. 17, that Onan did not recollect signing Exhibit H is no proof that the petitioner practiced fraud, trickery or deceit on him in order to procure the signature. It is only proof that Onan was an unwilling witness to the point of being unwilling to tell the plain truth. Finally, the statement made by the respondent that petitioner secured Onan's signature by fraud, trickery and deceit was completely discredited by the testimony of the other witnesses as being entirely erroneous and gratuitous and unsupported by the evidence. On top of all this, counsel for the respondent, admitted at the argument before the Supreme Court of Minnesota, as the court states in its opinion, that the signature was the genuine signature of Onan.

It is true; therefore, as a matter of law, that there was no evidence that petitioner obtained Onan's signature by deceit, fraud or trickery.

While we have refrained; as we think it our plain duty, from arguing that the evidence as a whole entitled the petitioner to an acquittal, we must point out that respondent's statements of fact should not be accepted as true for

the reason that the same are utterly untrustworthy in that the respondent's statements of fact abound with misstatements of the record and distortions of which we shall enumerate briefly a few:

(1) The first and most grievous one is that neither the Board of Directors nor the Executive Committee were aware of the existence "of the governing board of the Minnesota Five State Area or that any such entity in fact existed (made at page 6 of Respondent's Brief).

On June 13, 1955, the Board of Directors at a meeting attended by Phil G. Kraft, Secretary of the Foundation, a resolution was adopted that the executive committee "be empowered to act as the governing body of the Minnesota Five State Area" (R. 994, 993).

On July 11, 1957, about a month prior to the meeting authorizing petitioner's salary increase, the Board of Directors met and adopted the following resolution (R. 1226, f. 3):

> "RESOLVED: that the Executive Committee be empowered to continue to authorize salary adjustments and working conditions of Foundation personnel, as in the past."

(2) On March 4, 1957, the Executive Committee met in the Shamrock Hotel in Houston, Texas. The meeting was presided over by Mr. Reinecker and Mr. Kraft was the secretary thereof. The Board of Directors adopted a resolution commending the Executive Committee for action taken, acting under authority of the board "as the Five-State Area Committee" (R. 985-987).

(3) Further, on June 16, 1958, a resolution was adopted designating Reinecker, Kraft and others as the "Executive Committee" and "that the committee continue to serve as

the Minnesota Area Governing Board." Further similar meetings of the Board of Directors as the Governing Board of the Minnesota Five State Area and the records thereof are found at the following places in the record: p. 837, f. 2-3; p. 843, f. 2; p. 844, f. 3; p. 848, f. 2-3; p. 858, f. 1; and p. 993, f. 1-3."

(4) As to the meeting of the Executive Committee on July 17, 1957, Onan testified that the meeting could have been held and that he attended it, but that he could not recall the meeting (R. 413, f. 3). Reinecker, who presided at the meeting, according to the minutes, testified "we could have had a meeting" (R. 966, f. 2 - 967, 2); and Kraft testified that both he and Reinecker signed the minutes of July 17 the as secretary and president respectively (R. p. 871, f. 1-3), and that both of them were members of the Board of Governors for the Five State Area (R. p. 872, f. 1).

(5) In an effort to pin the authorship of State's Exhibit H on the petitioner, respondent makes the statement on page 5 of its brief, that petitioner and Wagner, the attorney for the Foundation, dictated Exhibit H to Catherine Wilcox, which is directly contrary to the Record. Mrs. Wilcox testified that petitioner and Wagner did not dictate the letter to her but told her what the contents thereof should be and that she should "draft" or "compose" it (R. 453, f. 1-3).

(6) Furthermore, contrary to the impression which the respondent would create the Board of Directors of the Foundation was thoroughly familiar with the procedure relative to salary increases. It adopted resolutions approving everything that had been done during the years 1957 - 1958 (R. 1000, f. 3 - p. 1009, f. 1-2). Reinecker testified that it was his understanding that it was the duty of Onan as treasurer to make salary adjustments (which was the very thing he did by signing State's Exhibit H).

Conclusion

For lack of any showing by respondent that petitioner in some manner obtained State's Exhibit H from Onan by trickery, fraud or deceit, it appears as a matter of law that the jury were permitted to find the petitioner guilty for so doing regardless of the fact that there was no evidence to support an affirmative finding of trickery, fraud or deceit. This being true, the conviction constituted denial to petitioner of due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Accordingly, the court should take jurisdiction and consider the granting of the writ upon the merits as prayed for by the petitioner.

Respectfully submitted,

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